No. 84-1292

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SUPREME COURT OF THE UNITED STATES

October Term 1984

STEARNS COAL AND LUMBER COMPANY, INC. - - - - - - - - - - Appellant

versus

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - Appellee

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On Appeal From the Supreme Court of Kentucky

MOTION TO DISMISS

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Dated: March, 1985

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36 pp

QUESTIONS PRESENTED

1. **Will this Court dismiss an appeal of a decision which rests on an independent and adequate non-federal ground?**
2. **Will this Court dismiss an appeal of a decision which does not draw into question and does not expressly pass upon a federal question?**
3. **Will this Court dismiss an appeal of a decision which presents no substantial federal question?**
4. **Will this Court dismiss an appeal of a decision where legislation enacted prior to the filing of the original complaint obviates the matters in dispute?**

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SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-1292

STEARNS COAL AND LUMBER COMPANY, INC. - *Appellant*

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET - - - - - *Appellee*

On Appeal From the Supreme Court of Kentucky

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss the appeal on the grounds that the decision below rests on an adequate and independent nonfederal ground; the decision below presents no substantial federal question; no federal question was expressly passed on by the decision below and legislation enacted by the state prior to the filing of the original complaint has obviated the matters in dispute.

OPINIONS BELOW

The Appellee takes strong issue with the Appellant's statement that the Supreme Court of Kentucky held below that the state could constitutionally appropriate the Appellant's property without payment of compensation.

The Supreme Court of Kentucky held that the land use restrictions of the Wild Rivers Act, 1972 Ky. Acts, Ch. 117 (Appellant's Appendix, pp. 53a-62a) were not self-executing but were conditioned and contingent upon the state determining the boundaries of the wild rivers areas by promulgated regulation. Therefore, consistent with its prior decision in *Commonwealth ex rel. D. N. R. & E. P.* v. *Stephens,* 539 S. W. 2d 303 (Ky., 1966) the court could not and would not enforce the prohibitions of the Wild Rivers Act against any property owner and therefore there was no taking of the Appellant's property as a matter of law. The court did indicate that the Appellant might have a valid trespass action against the Appellee.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions cited by the Appellant, this appeal also involves the 1976 liberalizing amendments to the Wild Rivers Act 1976 Ky. Acts, Ch. 197, Sections 2 and 9 (Appendix 1).

The Appellant omitted from its Appendix the approved date of 1976 Ky. Acts, Ch. 197, March 29, 1976, which date is of critical and important significance in the history of this litigation.

STATEMENT OF THE CASE

The history of the Kentucky Wild Rivers Act and of this litigation are straightforward and closely linked.

Through both the codification within the Wild Rivers Act and twice as set forth by the Supreme Court of Kentucky (*Stephens, supra* and the case herein below) in decisions under the Wild Rivers Act, private property interests potentially affected by the provisions of the Wild Rivers Act have been given full constitutional protection against being taken without just compensation in a manner fully consistent with the decisions of this Court. 1972 Ky. Acts, Ch. 117, §9; 1976 Ky. Acts, Ch. 197, §2.

This protection for private property is and has been recognized by the Wild Rivers Act, the courts of Kentucky and this Appellee as fundamental and not subject to being abridged.

On March 23, 1972 the Governor of Kentucky approved 1972 Ky. Acts, Ch. 117 to become effective June 16, 1972.[1]

Section 3 (in pertinent part) of the 1972 Act sets forth the policy and purposes of the Wild Rivers Act:

> . . . certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archeological and other scientific, aesthetic and cultural values.

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[1]The Appellant has reproduced in its Appendix 5, pages 53a through 62a most sections of this Act. However, it has omitted Section 15 of the Act which the Appellee produces in Appendix 1. This is an important section of the Act and evinces and underscores the holding of the court below that the Act is enabling legislation and not self-executing.

> . . . it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out of state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeld by man, it is in the interest of the Commonwealth to preserve some streams or portions thereof in their free-flowing condition because their natural, scenic, scientific and aesthetic values outweigh their value for water development and control purposes now and in the future.

Thus, Section 3 expressed the focus of the Act as preservation and protection of waters of the Commonwealth, owned by all and yet by none. Section 3 further provided that the Act did not require or authorize the acquisition of all lands or interests in lands to preserve and protect the streams and stream areas except where "necessary to preserve a true primitive environment in its pristine state." 1972 Ky. Acts, Ch. 117, Section 3.

Where it was necessary, however, the Act authorized the acquisition of fee title or scenic easement. 1972 Ky. Acts, Ch. 117, §4.

No landowner, except perhaps the Appellant, thought the Act required the state to condemn all areas within wild river boundaries.

By definition, the only stream segments and adjacent areas which could be included in the wild rivers system were those "with shore lines and scenic vistas essentially primitive and unchanged, free from the evi-

dence of the works of man and pleasing to the eye."[2] 1972 Ky. Acts, Ch. 117, §4.

The 1972 Act provided for the inclusion of segments of five streams or rivers including the Big South Fork of the Cumberland River from the Tennessee border to Blue Herron. This stream flowed through some of the Appellant's property.

To implement the Act, the Department for Natural Resources, an executive agency of the Commonwealth, was directed to ". . . determine generally the boundaries of the stream area," to include at least the visual horizon of the streams but not more than 2,500 feet from the center of the stream. 1972 Ky. Acts, Ch. 117, §6.[3]

Section 10 of the 1972 Act, which was never enabled as enacted, would have limited the land use activities allowed in wild river stream areas. Those activities the General Assembly determined to be most offensive to preserving the pristine and primitive nature of the streams would have been proscribed. For example,

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[2]It was believed, rightfully so, that these primitive areas were unlikely candidates for any significant commercial use and that those areas not already within public ownership would continue to remain undeveloped and primitive and pristine as they had throughout history minimizing the necessity for any acquisition of lands.

[3]In practice, the Department had an employee-engineer place boundary lines on topographical maps from visual inspections of the streams and using standard survey and map-making techniques. Then, using these maps, the two inspectors of the Department for this program would make inspections of the streams and stream areas to determine the presence of land use activities regulated or restricted by the Act.

mining and land disturbances would have been prohibited. However, the Act would have allowed other economically beneficial uses within these small stream areas such as select-cutting of timber, agricultural uses and even the placement of utility lines or pipelines.

1974 Ky. Acts, Ch. 206, as approved March 29, 1974, added Rock Creek from the White Oak Junction Bridge to the Kentucky-Tennessee border to the wild rivers system. This stream also flowed through land in which the Appellant owned surface and/or mineral interests.

Two major themes run through Appellant's jurisdictional statement as grounds for its action against the Commonwealth. Each of these themes are without merit.

The first theme is that the Wild Rivers Act dedicates private property to public use. The second theme is that the Act "promised" or "guaranteed" land owners that the state would buy their property.

Throughout Stearns' jurisdictional statement, Stearns states that the Wild Rivers Act was just a device to expand the state park system and that stream areas are state park areas. (See, for example, jurisdictional statement, pages 2, 3, 14, 17, 26). This is, simply, not true.

Even a cursory review of the 1972 and 1976 Acts, evinces a scrupulous regard by the Kentucky General Assembly for the protection of private property rights and makes express distinctions between public and private lands within stream areas. If anything, the Acts are read to minimize even the public access to

public lands. The Acts delineate clearly and precisely the express affirmative grounds and methods for and by which the state might acquire private lands or provide for public use of private lands. 1972 Ky. Acts, Ch. 117, §§4, 9; 1972 Ky. Acts, Ch. 199, §§2, 9.

A second major theme in the jurisdictional statement is that the Wild Rivers Act "promised" and "guaranteed" that the state would buy all private property within stream areas.

This is a totally frivolous argument.

The irony of the Appellant's argument has been that the very language that the legislature utilized to codify the constitutional shield of protection for private property is the same language appellant uses as a sword against the throat of the state, like a thief in the night, insisting that the state "buy" their property. The Appellee conceives the codification of the constitutional protections as alchemy automatically converting their private property into gold.[4]

At this point in the chronology, it is helpful to examine the state's implementation of the Act.

Utilizing no more than about two inspectors for 109.6 miles of streams and 25,952 stream area acres for all the state's wild rivers, the state's implementation

[4]Although the state, in planning for the implementation of the Wild Rivers Act, may have determined, generally, the amount and value of private property in stream areas and may even have hoped that the legislature would provide funds for limited acquisition of necessary properties, the Appellant has produced no evidence, because there is none, where any government official "promised" or "guaranteed" any person, not even the Appellant, specific payment for their property.

of the Act was uncomplicated. The state printed and distributed brochures describing the wild river areas, it placed signs at the beginning and ends of wild river segments, the inspectors went up and down the streams and perhaps at times onto stream areas to determine the visual horizon and thereafter prepared topographic maps of boundary lines for in house reference and monitored stream areas to determine land uses not in conformance with the Wild Rivers Act.

In November 1974, the state took its first legal action on a land use in apparent conflict with the Act. The State found a timber clear-cutting operation within a supposed wild river stream area of the Cumberland River. The state sought and obtained a temporary restraining order against the clear-cutting in Franklin Circuit Court on November 1, 1974.

After the restraining order was obtained, the property owner moved to dissolve and the state moved for a temporary injunction. The Circuit Court granted the temporary injunction but ordered the State to institute proceedings to compensate the landowner for any rights taken.

The landowner and the state appealed to the Kentucky Supreme Court.[5]

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[5]During the pendency of this appeal, on June 6, 1975 the state obtained two additional temporary restraining orders; one for an oil and gas drilling operation within what was believed to be the Rock Creek stream area and the second for two sawmilling operations along Rock Creek and also believed to be within the stream area. The oil and gas operations were being conducted by Western Reserves Oil Corporation, a lessee of the Appellant. Western Reserves remained restrained until October

(Footnote continued on following page)

Importantly, the restraining order against Western Reserves was the only formal legal action taken by the state with respect to the Appellant.

Also, the above-described legal actions constitute all legal actions taken by the state under the 1972 Act.

Against this backdrop, the Kentucky Supreme Court decided *Stephens, supra,* on July 2, 1976.

The court held that as the state, when seeking the restraining order against Stephens, had not "determined" the boundaries of the wild river areas as required by law (1972 Ky. Acts, Ch. 117, §6) that no court could determine whether any proscribed activity was within or without a wild river area and the state was without authority to restrain any land use that might be violative of the Act.

More fundamentally, the Kentucky Supreme Court held and construed that the Wild Rivers Act was enabling legislation and not self-executing. Otherwise, the prohibitions would have been in place automatically upon the effective date of the Act.

The *Stephens* opinion, as is the decision below, is a well reasoned defense supporting the constitutional protections of private property as enunciated by this Court.

There is also an interesting twist to the Stephens litigation. The landowners and amicus curiae in *Stephens* argued the state could not enforce the Act,

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(Footnote continued from preceding page)
28, 1977 and at one point was a plaintiff to this litigation. However, in 1981 the state and Western Reserves resolved their dispute and the state agreed to allow Western Reserves to apply to continue its oil and gas drilling operations.

could not impose the restrictions found in the Act, because the state had not determined the boundaries. The Appellant herein was that amicus curiae and represented by the counsel of record herein.

In this litigation, however, the Appellant, because it wants so badly for the state to buy its property, has argued the opposite position. That is, that the restrictions are in place and imposed upon their property from the enactment of the 1972 Act. This, of course, is what the Kentucky Supreme Court expressly rejected in *Stephens, supra.*

As a result of the Stephens litigation, legislation was introduced in the 1976 session of the Kentucky General Assembly to dramatically liberalize the Wild Rivers Act. The legislation changed the Wild Rivers Act from restricting uses to allowing essentially any use through a permitting process.

Importantly, the 1976 Act grandfathered in existing uses of land and allowed new roads, structures or buildings to be constructed to effect any use permitted under the Act. Further, any landowner could apply for a "change of use" to conduct timber removal, resource removal or other uses if it was not an existing use.[6]

On March 29, 1976 the Governor of Kentucky approved the liberalizing amendments which became effective June 19, 1976.

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[6]It has never been seriously asserted, even by the Appellant, that the greatly liberalized Act, effective June 19, 1976 constitutes a taking of property.

On March 29, 1976 it was therefore known that restrictions on land use under the 1972 Act, come June 19, 1976, would be significantly altered.

But, on April 7, 1976 eight days *after* the highly publicized approval of the 1976 amendments, the Appellant notified the state that on April 16, 1976 it would commence, within the boundaries of the Big South Fork wild river area, *every single activity* which would have been restricted or prohibited under the 1972 Act, if enabled.

Being mindful of the pending Stephens litigation, the state did not seek a judicial restraining order but did issue an administrative order seeking to preserve the status quo until an administrative hearing could be held. However, immediately upon the issuance of this administrative order the Appellant, on April 19, 1976 enjoined the state from interfering with the Appellant's activities. That restraining order continues in effect until this date.

Then, on May 25, 1976 the Appellant filed this inverse condemnation action for damages for restrictions allegedly imposed by the Wild Rivers Act.

One odd aspect to this litigation must be briefly highlighted. It is relevant.

Stearns had been, since about 1902, a large coal mining company and the major employer in McCreary County, Kentucky. For decades, it deep mined much coal through vast areas of McCreary County. In the course of this activity, Stearns laid down miles of railroad tracks, built tipples and coal washing machines and developed entire communities with company

owned stores, schools, churches and houses. Then, after several decades, the Appellant began to wind down its mining activities. By the 1950's it had pulled up its rails, closed the schools, razed the stores and moved the people from their homes. Communities that had once bustled with activity faded into memory.

By the mid-1960's the Appellant had essentially terminated its mining as its mineral reserves had substantially played out.

Previously, in 1937, Stearns had conveyed almost 40,000 acres of surface rights to the United States Forest Service.

During the 1950's, counsel for the Appellant, unsuccessfully, sought to have the Forest Service acquire the severed minerals under the surface of the previously conveyed lands.

The role of counsel to the company was assumed by Howard Baker, Jr. in the late 1950's and the early 1960's. In 1966, after an unsuccessful effort in 1964, Howard Baker, Jr. was elected to the United States Senate.

A major piece of legislation enacted under Senator Baker's guidance was the Big South Fork National River and Recreation Act (Pub. L. 93-251, Title I, §108, Mar. 7, 1974, 16 U.S.C. §460ee) which later had appropriated 16.5 million dollars for land acquisition.

Then, without notice to the parties or the trial court, in August 1979 the United States acquired "under threat of condemnation" (as stated by Stearns) 16.5 million dollars worth of Stearns real property interest, including 12,227 acres of the 27,332 acres in dispute in

this litigation! For the property in dispute in this litigation Stearns received approximately 5.6 million dollars from the United States.

The legal relevancy of this transaction, as the state has contended this was a voluntary sale, is the underlying concept in damages of being made whole.

If, as Appellant contends, this sale was under threat of condemnation, it must be presumed that Appellant received fair market value. Therefore, this case presented the question of whether a person in the position of Appellant was entitled to receive the fair market value twice from two different governmental entities.[7]

The Appellant's Statement of the Case contains an unusual number of mischaracterization of the facts and record some of which have been addressed above. Appellee would be remiss if it did not attempt to briefly respond to the more egregious misstatements.[8]

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[7]The Kentucky Supreme Court properly found that this sale by Stearns to the United States was relevant and material to a possible set-off against the trial court's judgment.

[8](1) p. 5—the state never invited the public to enter on and use Stearns' property. (2) p. 8 (footnote 10)—the Appellee has permitted several resource removal actions in the past several years including oil and gas drilling. (3) p. 9 — at the time (April 6, 1976) Stearns says it was "now facing the prospect of a new set of prohibitions" the 1976 liberalizing amendments had already been approved by the Governor (March 29, 1976). (4) p. 10 — Stearns states that it was "notified that the United States wanted to purchase"—Stearns did not reveal to this Court that in 1975 Senator Baker met with the president of Stearns to discuss the amount of the purchase price for the United States buying Stearns' properties. (5) p. 11 — the Kentucky Supreme Court did not find that the Appellant suffered any deprivation of property (it did state that an action for trespass might have

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ARGUMENT

I. The Judgment Below of the Kentucky Supreme Court Rests on an Adequate Nonfederal Basis.

The Kentucky Supreme Court applied the law of the case of *Commonwealth, ex rel, D.N.R. & E.P.* v. *Stephens, supra,* to reach its decision in the case herein. The Kentucky Supreme Court stated that:

> In Stephens, *supra,* this Court held that until the stream areas were designated, the Commonwealth could not enforce the prohibitions of the act against any property owner. Consequently, there was no taking of the Stearns property as a matter of law.
>
> * * *
>
> The passage of the wild rivers act was not a taking of the property. The enforcement of the Act could not have occurred until at least July 22, 1976 when the boundaries were officially designated by proper regulation. (Appellant's Appendix, 4a).

In *Stephens, supra,* the Court construed and interpreted the Wild Rivers Act and held that it is enabling legislation, not self-executing. Its effectiveness was absolutely dependent on the state complying with all procedural prerequisites as a condition of any of the restrictions being effective or enforced.

(Footnote continued from preceding page)
been brought). (6a) p. 11—the Kentucky Supreme Court did not say that even if some enforcement actions unconstitutionally infringed on property rights the remedy was injunction not a suit for damages. (7) p. 12 — in addition to the beneficial economic uses Stearns made of its property it at all times retained full possession and use of its property.

It is respectfully submitted that the Kentucky Supreme Court, being the highest state court in which a decision could be had in this case, based its opinion expressly upon a substantial and sufficient nonfederal ground and the Supreme Court of the United States should not take jurisdiction to review the opinion. *Black* v. *Cutter Laboratories,* 351 U. S. 292 (1956).

Twice, the Kentucky Supreme Court has been presented with the construction of the 1972 Wild Rivers Act and its holdings have been evenhanded, consistent and uniform in holding that the Act is enabling legislation and did not take property by its mere enactment.

In *Cuyahoga Power Company* v. *Northern Realty Company,* 244 U. S. 300 (1917) the appeal was dismissed where, as in this case, the controversy revolved around a matter of purely state law, that being the exercise of the power to condemn. This Court held this constituted an adequate nonfederal basis to dismiss the appeal.

Although the Kentucky Supreme Court discusses taking law under leading federal cases, it is clear that the Kentucky court did not rest its decision to any extent upon the application or interpretation of federal law. But, even if it had, the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Jankovich* v. *Indiana Toll Road Commission,* 379 U. S. 487 (1965). See also *Utley* v. *St. Petersburg,* 292 U. S. 106 (1934); *Minneapolis and Co. Ry.* v. *Washburn Co.,* 254 U. S. 370 (1920).

It is fundamental that state courts have the supreme power to interpret the written laws of the state. As Justice Reed wrote in *Greenough* v. *Tax Assessors of Newport,* 331 U. S. 486 (1947):

> State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal constitution that we have power to protect or enforce the federal rights.

At page 497.

This Court is bound to accept the interpretation of state law in the decision of the Kentucky Supreme Court that as a matter of Kentucky law the statute is enabling legislation dependent for substantive force on the formal establishment of stream areas. *J. Bacon & Sons* v. *Martin,* 305 U. S. 380 (1939).

The Kentucky Supreme Court expressly held that its decision that there was no taking was a matter of state law. (Appellant's Appendix, 4a). This Court has consistently held that it will accept and does not review such questions of state law. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

There can be no question as to the presence of fair and substantial evidentiary support in the facts for the state court ruling on the issue of whether the boundaries had been determined. Indeed, as emphasized in

the statement of the case herein, the legal necessity for formal boundary determination was espoused and advocated not just by Appellee *but also by counsel for Appellant* as amicus curiae in the earlier *Stephens* case!

The Kentucky Supreme Court's decision is so clearly rested on the construction of the state statute that there is no doubt that even if this Court modified the state court's views expressed on the federal laws the same judgment would still be rendered by the state court. Thus, this Court's review would amount to essentially an advisory opinion. *Herb* v. *Pitcarin,* 324 U. S. 117 (1945); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1874).

Thus, the decision of the Kentucky Supreme Court satisfies both major elements necessary for this Argument: (1) the state court judgment is based on a nonfederal ground, and (2) the nonfederal ground is adequate to support the state court judgment. As well stated in Stern and Gresman, Supreme Court Practice, 5th Edition, 1978, p. 165:

> . . . in respect to construction of state statutes, the state court views are completely nonreviewable by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari.

Therefore, based on the above Argument and authority this Court must dismiss the appeal.

II. The Judgment Below of the Kentucky Supreme Court Did Not Draw Into Question or Expressly Pass on the Federal Question Presented.

The decision of the Kentucky Supreme Court does not expressly adjudicate the federal claims which Appellant had asserted.

The appellate jurisdiction of this Court cannot be invoked under 28 U.S.C. §1257(2) where the court below does not draw into question and expressly pass upon a federal question.

Although the Kentucky Supreme Court discusses its understanding of the federal law of taking jurisprudence it cannot be asserted that there was any decision on a federal question that was necessary for the court to render its opinion. *Durley* v. *Mayo,* 351 U. S. 277 (1956). Nor can it be reasonably claimed that any federal right was adjudicated against the Appellant by the judgment of the state court. *Cleveland and Pittsburgh Railroad Company* v. *City of Cleveland, Ohio,* 235 U. S. 50 (1914).

It is apparent that the court did not treat the federal questions raised by Appellant as necessarily involved in its holding and it reached its result without deciding the federal constitutional questions.

While the Appellant may have "pressed" federal constitutional claims below, the Kentucky Supreme Court did not "pass upon" those claims. *Illinois* v. *Gates,* 103 S. Ct. 2317 (1983), *State Farm Mutual Automobile Insurance Co.* v. *Duel,* 324 U. S. 154 (1945).

To preserve the fundamental and historical balance between the federal and state court jurisdictional forums this Court must be "wary of assuming jurisdiction" in this action as the federal questions raised by the Appellant were not necessary to the decision. *Department of Mental Hygiene of California* v. *Kirchner,* 380 U. S. 194 (1965). Any doubts this Court might have concerning its jurisdiction must be resolved against jurisdiction. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948).

Therefore, the appeal must be dismissed as no federal question has been expressly passed upon by the Kentucky Supreme Court below.

III. The Matters in Dispute Below Do Not Present Any Substantial Federal Question Nor Warrant Plenary Consideration.

The Kentucky Supreme Court rested its decision on the necessity of state procedure being followed to enable the state Wild Rivers Act as a matter of law. The decision of the court, therefore, does not present a substantial federal question. *Iowa Central Railway Co.* v. *Iowa,* 160 U. S. 389 (1896); *Londoner* v. *Denver,* 210 U. S. 373 (1908).

Further, the decision of the Kentucky Supreme Court revolves upon the *construction* of that portion of the Wild Rivers Act requiring the state to determine the boundaries of the stream areas and actually does not address the *validity* of the statute. Thus, no federal question is presented. *Grand Gulf Railroad and Banking Company* v. *Marshall,* 53 U. S. 83 (1851).

The Appellant focuses its discussion of why its questions presented are substantial on two major areas. First, it makes the argument that 1972 Ky. Acts, Ch. 117, by its own terms and application, "took" its property from the date of enactment.

The Appellant faces an immediate problem with that argument because at the trial court it argued and the court accepted as the date of taking not the date of enactment of the 1972 Act but a date over three years later, June 25, 1975. This was the date the state obtained a restraining order against Stearns lessee. Stearns' arguments are inexplicably inconsistent.

Thus, the Appellent's first major theme is that the express terms and effect of the 1972 Act constituted a taking of its property.

On this issue is presented the nexus of this case. For it focuses precisely on whether the Kentucky Supreme Court's decision that the 1972 Act is enabling legislation as a matter of state law is correct and proper.

If the Kentucky court is to be upheld in that determination then, as a matter of state law, the restrictions of the 1972 Act have no legal relevance under the taking analysis until the Act became enabled on July 22, 1976 when the state promulgated the boundaries of the stream areas. Again, the irony of this case is that is exactly what counsel for Appellant argued in *Stephens, supra,* where the court ruled in Appellant's favor.

Then, when the Act became enabled on July 22, 1976, the 1976 liberalizing amendments had gone into effect.

With its complete change of focus allowing all existing uses and establishing a change of use permitting scheme there is really no question that the 1976 amendments would pass constitutional muster.

This Court has held that it will not review a constitutional challenge to a state law where legislation subsequent to the Complaint has laid to rest the constitutional issues in dispute. This principle must be applied herein. *Stickney* v. *Kelsey,* 209 U. S. 419 (1908).

If this Court overrules the court below and holds that the Kentucky court's decision on the enabling issue is erroneous then a full constitutional defense of the 1972 Act by Appellee will be made in the brief on the merits.

However, as the Kentucky Supreme Court concluded, it is apparent that the 1972 Act had no legally significant consequence for the property of Appellant.

It is fundamental that a determination of a taking must address, on an ad hoc factual basis, each discrete parcel of real property alleged to have been taken.

This is where the Appellant makes its second major argument and where it encounters its second and most telling problem.

If this Court were to examine, as the Kentucky Supreme Court did, not what the state said but what the state did (as requested by the Appellant) the conclusion is inescapable that, as to Appellant and Appel-

lant's property, the state did no act significantly affecting the property of the appellant.

One or more inspectors may have walked upon Appellant's property somewhere within the 27,000 acre area. Signs were posted at the beginning and end of river segments. But the signs did not, as Appellant contends, invite the public to use Appellant's property. See Appellant's Appendix 7. The state restrained an oil and gas lessee from June 25, 1975 to October 28, 1977. Public information brochures were distributed in parts of the state generally informing the public of the wild rivers program.

That is what the state did.

Conversely, the Kentucky Supreme Court found that Stearns retained full possession and ownership of the lands, it cut timber for commercial sale, it received royalties from a five year oil lease on 9,930 acres, it had a 37,000 acre lease to Western Reserves Oil Company, it conducted extensive logging operations and had a 10 year lease to the state on 10,000 acres for a public hunting and wildlife management area.

Thus, the Kentucky Supreme Court properly concluded that:

> Stearns has not suffered an excessive interference with the legally protected use of the land that has been generally designated as a Wild River area, and the land has not been destroyed nor has an additional burden been placed upon the maintenance of that use. (Appellant's Appendix, 7a).

Utilizing the well-reasoned criteria of this Court as set forth in *Penn Central Transportation Co.* v. *New*

York City, 438 U. S. 104 (1978) to determine whether the Wild Rivers Act works a taking Appellee states that (1) the Appellant did not establish that the 1972 Act had an economic impact on it; (2) the Appellant did not prove that the Act interfered with any distinct investment backed expectations[9]; (3) The 1972 Act was not a physical invasion of the Appellant's property but rather a public program adjusting the benefits and burdens of economic life to promote the public good; (4) the 1972 Act permitted the continued use of the rugged, primitive stream areas for agricultural uses, for pipelines and utility lines, allowed roads to be used, and select cutting of timber could occur (historically a commercial enterprise in the wooded hills of Eastern Kentucky)[10]; (5) The Kentucky General Assembly included the protected stream areas very selectively based on express criteria; (6) Judicial review of the state's action in enforcing the Wild Rivers Act was and continues to be available.[11]

As in *Penn Central, supra,* this Court must conclude that the 1972 Act did not affect a taking as the restrictions imposed (which were not even put into

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[9]The record below establishes that for the parcel in question the Appellant neither had any reasonably foreseeable investment backed uses to be made of the property nor did it produce any specific offers by any person to either lease or purchase the parcels which were affected by the Wild Rivers Act.

[10]Under the 1976 Act all existing uses and changes of use could be conducted, except strip mining, pursuant to a permitting program.

[11]KRS 224.081(2), KRS 224.083, KRS 224.085 sets forth criteria for administrative and judicial review.

place under the holding of *Stephens, supra,* in the court below) were substantially related to the promotion of the general welfare and permitted reasonable beneficial uses of the stream areas by Appellant.

Appellant places great reliance upon *Hamilton Bank* v. *Williamson County Regional Planning Commission,* 729 F. 2d 402, (6th Cir.), cert. granted, 105 S. Ct. 80 (1984).

However, that case is easily distinguishable. Unlike the finding of the Court of Appeals in *Hamilton,* the Kentucky Supreme Court below found no interference with the Appellant's investment-backed expectations. The court in *Hamilton* held that, ". . . it is the application of the laws or regulations which effectuates the taking." The Kentucky Supreme Court expressly found and held that the state's application of the 1972 Act to Appellant amounted to no more than a possible action for trespass.

As the Appellant made and received substantial economic use and benefit from its property at all times in dispute and suffered no significant detrimental economic consequence, this is hardly a case calling for plenary consideration of major constitutional issues.

CONCLUSION

For all the foregoing reasons Appellee respectfully requests this Court to dismiss the appeal.

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APPENDIX

1972 KY. ACTS, CH. 117, § 15
CHAPTER 117
(S.B. 138)

Section 15. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

A fund for the purpose of carrying out the provisions of this Act is hereby created to be designated as a "Wild Rivers System Fund" to consist of all revenues derived from privileges, concessions, contracts, or otherwise, all monies received by gifts, contributions, donations and grants from public or private sources. Such "Wild Rivers System Fund" shall be disbursed by the Department of Natural Resources, after appropriations are made by law, for administration and other expenses and for other purposes provided by this Act.

1976 KY. ACTS, CH. 197, § 2, 9

Note: Text in brackets is deleted from prior law; text in italics is added to prior law.

Section 2. KRS 146.220 is amended to read as follows:

The General Assembly hereby recognizes that certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archaeological and other scientific, aesthetic, and cultural values. It is the policy of the General Assembly to complement dam construction and development projects on Kentucky watercourses with other equally important and beneficial uses of our water resources. Therefore, it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out-of-state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeled by man, it is in the interest of the Commonwealth to preserve some streams or

portions thereof in their free-flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their value for water development and control purposes now and in the future. For aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works. Since the stream areas are to be maintained in a natural state, they will also serve as areas for the perpetuation of Kentucky's wild fauna and flora. Few such streams remain in the Eastern portion of the United States, and the General Assembly feels a strong obligation to the people of Kentucky to preserve these remnants of their proud heritage. It is the purpose of KRS 146.200 to 146.350 to establish a Wild Rivers System by designating certain streams for immediate inclusion in the system and by prescribing the procedures and criteria for protecting and administering the system. It is not the intent of KRS 146.200 to 146.350 to require or to authorize acquisition of all lands or interests in lands within the [exterior] boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources. *It is the intent of KRS 146.200 to 146.350 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers, so that the public trust in these unique natural rivers might be kept.*

Section 9. KRS 146.290 is amended to read as follows:

(1) The provisions of this section shall not apply to those uses existing at such time as a stream is included in the system.

(2) Land uses to be allowed within the [exterior] boundaries of a designated stream area shall be as follows:

New [No new] roads, *structures* or buildings *may* [shall] be constructed *only where necessary to effect a use permitted under the other provisions of this Act.* Utility lines or pipelines *may* [shall not] be constructed *as* [unless] approved by the secretary in writing and under provision that the affected land be restored as nearly as possible to its former state. This provision, however, shall in no way affect the rights between a landowner and a utility company or pipeline company. There shall be no *strip* mining *as defined in KRS 350.010,* and select cutting of timber *or other resource removal and agricultural use, may* [shall] be allowed [only] pursuant to regulations *promulgated* [issued] by the secretary *upon the granting of a permit under the other provisions of this Act.* All [land disturbances, including] instream disturbances such as dredging, shall be prohibited. Except for the management agency *and any existing uses which do not conform to the purposes and intent of this Act, travel upon a wild river or any public lands within the designated boundaries thereof,* [access] shall be by foot, horseback, canoe, boat or other nonmechanical modes of transportation. If there are existing agricultural areas within the boundaries of the area, such areas may continue to be used for agricultural purposes.

(3) Any landowner within the boundaries of the area may apply to the secretary for a change of use to permit the select cutting of timber, a resource removal or an agricultural use upon his property located within the area and

the secretary shall hold a public hearing after public notice on the application within sixty (60) days. The landowner or any interested person shall be allowed to present evidence as to whether the proposed use by the applying landowner are in accordance with the management plan developed pursuant to KRS 146.270, the purpose and intent of the Wild Rivers Act as expressed in KRS 146.220, and other applicable law.

(4) The secretary shall, within sixty (60) days, after said hearing, either:

(a) Issue an order, with accompanying opinion, denying the permit; or

(b) Issue an order, with accompanying opinion, granting the permit with such restrictions, terms and conditions as are appropriate to protect to the fullest extent possible the wild rivers area and the public trust therein within the intent of KRS 146.220; or

(c) Recommend an alternate use to which the land may be put under this Act which is more consistent with the purposes and intent of this Act than the use for which application was made.

(d) Institute condemnation proceedings in the circuit court of the county in which the land is located or else negotiate a purchase of the land affected, or any interest therein.

(5) On or before thirty (30) days from the date of the secretary's ruling, the landowner may file with the department a written objection to the ruling. If, within the next sixty (60) days the landowner and the secretary are unable to reach an agreement with respect to a modification of his ruling, the secretary must either permit the use applied for, condemn the property, or petition the Franklin Circuit Court for an order restraining the proposed use. The order shall be entered immediately upon the filing of the petition

and the execution of a bond without surety by the Commonwealth in an amount satisfactory to the court to indemnify the landowner against loss of profits from any wrongful restraint of the use of his property during the period from the filing of the petition until such time as the matter is included by the courts. The court shall review the decision as to both law and fact, but no factual finding shall be reversed unless clearly erroneous or else arbitrary, capricious, or an abuse of discretion.